

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT DIBERNARDO and DEPARTMENT OF AGRICULTURE,
PACKERS & STOCKADES ADMINISTRATION, Lancaster, PA

*Docket No. 99-2247; Submitted on the Record;
Issued September 25, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether appellant had any disability after April 1, 1994 that was causally related to his April 26, 1993 employment injury.

The case has been on appeal previously.¹ In an April 2, 1999 decision, the Board noted that, on April 26, 1993, appellant developed back pain while lifting weights to test a scale. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain. Appellant retired and subsequently filed a claim for recurrence of disability effective April 1, 1994. The Office found that appellant had failed to meet his burden of proof in establishing a causal relationship between the employment injury and his current disability. The Board found that the reports of Dr. John Palumbo, a Board-certified family practitioner, indicated that appellant had been placed on driving restrictions due to the effects of the employment injury, and that, because of those restrictions, appellant was unable to perform his duties and was forced to retire. The Board held that the uncontradicted medical reports of Dr. Palumbo, while insufficient to meet appellant's burden of proof, were sufficient to require further development of the record. The Board therefore set aside the Office's decisions and remanded the case for referral of appellant to an appropriate physician for a second opinion on whether appellant's condition was caused or aggravated by the April 26, 1993 employment injury and, if so, whether he had any disability after April 1, 1994 due to the employment injury.

On remand the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Dean Nachtigall, an osteopath, for an examination. In a May 17, 1999 report, Dr. Nachtigall reported that appellant had no severe changes in his gait or stance and had satisfactory flexion of the lumbar spine. He noted that percussion of the low back caused no leg pain and indicated that straight leg raising was negative. He found no paresis of the great toe bilaterally and no hypoesthesia of the dermatome pattern of the legs. He noted that a

¹ Docket No. 97-1350 (issued April 2, 1999).

February 15, 1999 myelogram showed no evidence of spinal impingement or nerve root impingement of the lower lumbar region. He stated that appellant's findings were subjective in nature. Dr. Nachtigall concluded that appellant's condition was aggravated by the April 26, 1993 employment injury which caused disability but would have resolved by the time of his retirement. He noted that appellant had performed light duty from April 26, 1993 until his retirement. He commented that the disability after April 1, 1994 was not related to the employment injury.

In a May 28, 1999 decision, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that the claimed recurrence of disability of April 1, 1994 was causally related to the April 26, 1993 employment injury and that the medical evidence established that the residual effects of the employment injury had ceased.

The Board finds that the case is not in posture for decision.

Dr. Nachtigall stated that appellant had only subjective findings and concluded that the residuals of the April 26, 1993 employment injury had ceased. He also stated that appellant's condition would have resolved by the time of appellant's retirement. Dr. Nachtigall opined that the effects of the April 26, 1993 employment injury would have ceased by April 1, 1994. His report found that the residuals of the April 26, 1993 employment injury no longer existed at the time of his examination, six years after the employment injury. Dr. Nachtigall's report conflicts with Dr. Palumbo's statements in his October 8, 1996 deposition that appellant had driving restrictions due to residuals of the April 26, 1993 employment injury and appellant retired as he could no longer perform the duties of his position. The physicians therefore disagreed on whether appellant had any residual disability after April 1, 1994 causally related to the April 26, 1993 employment injury. Section 8123 of the Federal Employees' Compensation Act² provides, "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." The case will therefore be remanded for referral of appellant to an appropriate impartial medical specialist. The specialist should be requested to give a diagnosis of appellant's conditions and give a rationalized opinion on whether appellant had any residual disability after April 1, 1994 causally related to the April 26, 1993 employment injury. After further development as it may find necessary the Office should issue a *de novo* decision.

² 5 U.S.C. § 8123.

The decision of the Office of Workers' Compensation Programs, dated May 28, 1999, is hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
September 25, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member